UNITED STATES TAX COURT
WASHINGTON, DC 20217

W. TODD & JOHNANNA HOEFFNER,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 25760-12 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	

ORDER AND DECISION

Petitioners, while residing in New York, petitioned the Court under section 6330(d) to review a determination by respondent's Office of Appeals (Appeals), which sustained a proposed levy upon petitioners' property.

On October 25, 2013, respondent filed a Motion for Summary Judgment (respondent's motion) as to all outstanding issues in this case. On November 14, 2013, petitioners filed a response to respondent's motion. On that same day, petitioners filed a Cross Motion for Summary Judgment as to all outstanding issues in this case (petitioners' motion). On November 21, 2013, respondent filed a reply to petitioners' response to respondent's motion and on November 22, 2013, respondent filed a response to petitioner's motion.

The issues for decision are: 1) whether petitioners received a valid collection due process (CDP) hearing; (2) whether petitioners are liable for the section 6651(a)(1)[1] late filing addition to tax; and (3) whether petitioners are liable for the section 6651(a)(2) late payment addition to tax.

[1]All section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

SERVED Nov 26 2013

I. Background

The following facts are not in dispute.

a. Mr. Hoeffner's Criminal Case and Petitioners' 2008 Return Filing

Mr. Hoeffner is an attorney and a founding partner of Hoeffner & Bilek.

On June 25, 2007, an indictment was filed in United States District Court, Southern District of Texas (District Court) against Mr. Hoeffner (and two other defendants) based on the following grand jury charges: (1) conspiracy under 18 U.S.C. sec. 371; (2) conspiracy to launder money under 18 U.S.C. sec. 1956(h); (3) two counts of wire fraud under 18 U.S.C. sec. 1343; and (4) four counts of mail fraud under 18 U.S.C. sec. 1341.

Shortly after his indictment, Mr. Hoeffner dissolved Hoeffner & Bilek and referred all his cases to another firm so that he could devote his time and energy to defending his criminal case. Chris Flood (Mr. Flood) was the lead defense attorney in Mr. Hoeffner's case.

On June 25, 2007, the District Court ordered that Mr. Hoeffner be released on bond and issued an "Order Setting Conditions on Release" (release order). The release order instructed Mr. Hoeffner to "avoid all contact, directly or indirectly, with any persons who are or who may become a victim or potential witness in the subject investigation or prosecution". Although John White (Mr. White), petitioners' certified public accountant (C.P.A.) since 2000, was not explicitly named in the release order, respondent concedes for the purposes of his motion that petitioners believed they were prohibited from contacting Mr. White, either directly or indirectly.[2]

On April 15, 2009, petitioners timely filed with the IRS a request for an extension of time in which to file their 2008 tax return. The due date for petitioners' 2008 return was extended to October 15, 2009.

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[2]In August of 2009, Mr. Hoeffner was served with an amended witness list expressly adding Mr. White to those persons with whom Mr. Hoeffner could not communicate directly or indirectly.

During August and September of 2009, a jury trial was held in Mr. Hoeffner's criminal case. In October of 2009, after the jury failed to reach a unanimous verdict, the District Court declared a mistrial.[3]

On March 29, 2010, petitioners received a taxpayer delinquency notice from the IRS. On April 29, 2010, while the case was stayed pending appeal, Mr. Hoeffner filed with the District Court an "Agreed Motion to Amend Certain Pretrial Restrictions" stating that "[Mr. Hoeffner] has received correspondence from the IRS requesting that he file his 2008 tax return" and requesting that the pretrial restrictions set forth in the release order "be amended for the sole purpose of [Mr. Hoeffner] contacting his CPA [John White] so he may complete his tax returns". On April 30, 2010, the District Court granted Mr. Hoeffner's motion and ordered that "Defendant Warren Todd Hoeffner's pretrial restrictions are temporarily amended to allow him to contact his CPA, John White, for the sole purpose of preparing his tax returns."

On July 27, 2010, John White signed petitioners' 2008 return as the paid preparer and on August 1, 2010, petitioners signed their 2008 return. On August 4, 2010, respondent received petitioners' 2008 return. On their 2008 return, petitioners reported tax in the amount of $656,796 and an estimated tax penalty in the amount of $10,403. On August 16, 2010, respondent processed petitioners' payment in the amount of $667,199.

b. IRS Administrative Proceedings

On September 6, 2010, respondent issued a "Statutory Notice of Balance Due" assessing the following additions to tax and interest for 2008: (1) addition to tax under section 6654 in the amount of $6,350.26 for petitioners' failure to make estimated tax payments; (2) addition to tax under section 6651(a)(1) in the amount of $147,779.10 for petitioners' failure to timely file their return; (3) addition to tax under section 6651(a)(2) in the amount of $55,827.66 for petitioners' failure to timely pay taxes owed; and (4) interest in the amount of $41,513.22.

[3]On June 01, 2012, Mr. Hoeffner and the United States filed a joint motion to dismiss all criminal charges, which the District Court granted that same day.

1. Penalty Abatement Request Appeal

Petitioners submitted a request for abatement of the late filing penalty for 2008,[4] which was denied by respondent's service center on December 27, 2010. On March 9, 2011, petitioners appealed the service center's denial of their penalty abatement request for their 2008 late filing penalty to Appeals.

On April 25, 2011, petitioners' penalty abatement appeal was assigned to Appeals Officer Estelle Gottlieb (Appeals Officer Gottlieb). In a letter dated May 23, 2011, respondent's New York Office of Appeals informed petitioners that it had received their case for consideration and identified Appeals Officer Gottlieb as the contact person. On May 25, 2011, petitioner informed Appeals Officer Gottlieb that "we do wish to have the opportunity to address all relevant matters in a face to face conference at your [New York] office".

In a letter dated January 24, 2012, Appeals Officer Gottlieb informed petitioners that they should call to schedule their Appeals conference.[5] Petitioners informed Appeals Officer Gottlieb that they were protesting the late filing penalty for 2008 and that they believed that the late payment penalty had already been paid, in a letter dated March 15, 2012. Several days later, in a letter dated March 20, 2012, petitioners provided Appeals Officer Gottlieb with arguments and supporting documents explaining why their 2008 return was filed late.

On November 21, 2011, Appeals Officer Gottlieb held petitioners' Appeals conference. During the Appeals conference, petitioners explained that as a condition of release set forth in an order, Mr. Hoeffner could not contact any potential witnesses, including Mr. White. They further explained that this prohibition continued until April 30, 2010, when the District Court amended the order to allow Mr. Hoeffner to contact Mr. White for the sole purpose of preparing petitioners' tax returns. Finally, petitioners asserted that they filed their 2008 returns "reasonably promptly" after being permitted to communicate with Mr.

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[4]In the IRS' administrative file for petitioners, the IRS and petitioners refer to the section 6651(a)(1) and section 6651(a)(2) additions to tax as the "late filing penalty" and "late payment penalty", respectively.

[5]This letter was mailed to the incorrect address and, consequently, petitioners did not receive it until March 15, 2012.

White. That same day, petitioners wrote Appeals Officer Gottlieb a letter memorializing the contents of their discussion.

Based on petitioners' arguments and submissions of evidence, Appeals Officer Gottlieb wrote a detailed report recommending that petitioners should be held liable for the failure to file and failure to pay penalties for 2008. In her report, Appeals Officer Gottlieb reasoned:

> Taxpayers could not furnish proof of what steps he took to ask the Court to allow his accountant to prepare their return or try to hire another accountant. Taxpayers should have at least paid the taxes due. There was no reasonable cause established for not paying their taxes.
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> * * * * * * *
>
> The Service Center did not abate the failure to file and pay penalties because the information provided did not establish reasonable cause. The claim for removal of the penalty for failure to file and pay on time cannot be considered because the event the taxpayer and representative described did not occur until after the tax payment was already due. Even if the taxpayer had an extension of time to file, the taxpayer is required to estimate and pay the taxes by the return due date (April 15, 2009).

2. Collection Due Process Case

While petitioners' penalty abatement appeal was pending, respondent moved forward with assessing and collecting the additions to tax and interest for 2008.[6]

On March 7, 2011, respondent sent petitioners a letter entitled "Final Notice of Intent to Levy and Notice of Your Right to a Hearing". In a letter dated March 11, 2011, petitioners stated "[w]hile [we] think it would be unnecessary and

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[6]Pursuant to section 6665(b), the IRS may "immediately assess and collect the addition to tax under section 6651(a)(1) and (2) if such additions are determined (i.e., measured) by the amount of tax shown on the taxpayer's return". Meyer v. Commissioner, 97 T.C. 555, 559-560 (1991). Furthermore, such additions are "not subject to the [standard] deficiency procedures". Id.

premature, if you believe that the 'Collection Due Process hearing' is appropriate, please consider this letter as a request for such a hearing".

On September 21, 2011, Appeals sent petitioners a letter informing them that their case was assigned to its Philadelphia office. On September 27, 2011, petitioners' case was assigned to Settlement Officer Regina White (Settlement Officer White).

On October 3, 2011, petitioners sent respondent a letter informing them that they had previously requested a face-to-face hearing in New York, their request had been granted, and they were waiting for the hearing to be scheduled.

In a letter dated December 13, 2011, respondent's Philadelphia Office of Appeals informed petitioners that it had received their CDP hearing request and identified Settlement Officer White as the person of contact. The letter further stated that their penalty abatement appeal was currently assigned to Appeals Officer Gottlieb and advised petitioners that they may withdraw their request for a CDP hearing if one was no longer needed.

In a second letter dated December 13, 2011, respondent's Philadelphia Office of Appeals informed petitioners that their CDP hearing was scheduled for January 11, 2011 at 9:30 a.m and would be held telephonically. The second letter further advised petitioners that "[i]f this time is not convenient for you, the phone number has changed, or you would prefer your conference to be held by face-to-face at the Appeals office closest to [you] * * *, please let me know within fourteen (14) days from the date of this letter." Petitioners confirmed the scheduled telephone conference and advised respondent that they would not be proposing a collection alternative in a letter dated December 19, 2011.

On January 3, 2012, petitioners wrote to Settlement Officer White stating that their attorney would be in the Philadelphia area on January 11, 2012 and requesting that either the telephonic CDP hearing be moved to 4 p.m. that afternoon or that an in person CDP hearing be held that morning. Settlement Officer White informed petitioners that the Philadelphia office does not offer in person CDP hearings, but offered to reschedule the telephonic CDP hearing to January 11, 2012 at 3 p.m. Petitioners agreed.

On January 11, 2012, Settlement Officer White held a telephonic conference with petitioners. Settlement Officer White informed petitioners that this meeting was the CDP hearing under section 6330 with respect to the proposed levy for the

2008 tax year. Petitioners stated that they were currently working with Appeals Officer Gottlieb on their penalty abatement appeal for the same tax period, and Settlement Officer White told them that she was aware that Appeals Officer Gottlieb was also assigned their case. After the conference, Settlement Officer White requested and received approval to transfer the case to Appeals Officer Gottlieb. On February 1, 2012, petitioners' CDP case was transferred from Appeals' Philadelphia office to its New York office.

For an unknown reason, petitioners' CDP case was not assigned to Appeals Officer Gottlieb, but rather to a settlement officer in respondents' New York Office of Appeals, Iris Reubel (Settlement Officer Reubel). In a letter dated March 1, 2012, the New York Appeals office informed petitioners that their cased had been received and identified Settlement Officer Reubel as the contact person. On March 5, 2012, petitioners wrote to Settlement Officer Reubel informing her that their penalty abatement case had been referred to Appeals Officer Gottlieb several months earlier.

In a letter dated March 8, 2012, Settlement Officer Reubel informed petitioners that their CDP hearing had been scheduled for April 3, 2012 by telephone conference and that the call would be their primary opportunity to discuss the reasons they disagree with the collection action or alternatives to collection. This letter also advised petitioners that if they preferred, they could request a face-to-face CDP hearing at the Appeals office closest to them. Petitioners confirmed the scheduled CDP hearing in a letter dated March 12, 2012.

On April 3, 2012, Settlement Officer Reubel held petitioners' CDP hearing as scheduled. During that hearing, petitioners represented that they had already paid the late payment penalty and sought a one week extension to obtain proof thereof.[7] Settlement Officer Reubel granted the one week extension.

On April 19, 2012, Settlement Officer Reubel called petitioners to follow up on their previous discussion on April 3, 2012. Petitioners offered to concede the late payment penalty if Appeals would concede the late filing penalty. Petitioners also indicated that if Appeals does not accept their settlement offer, they would take matters to court.

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[7]It appears that petitioners were unable to find proof of payment for their late payment penalty.

Initially, Settlement Officer Reubel told petitioners that she could not raise issues of liability in their CDP hearing because the taxpayer had a prior opportunity to dispute that liability with Appeals Officer Gottlieb. After speaking with her manager, however, Settlement Officer Reubel learned that petitioners could dispute the underlying liability during their CDP hearing. Settlement Officer Reubel further understood that she would make the ultimate determination regarding petitioners' liability for additions to tax under section 6651(a)(1) and (2).

On September 14, 2012, after Appeals Officer Gottlieb had rejected petitioners' penalty abatement request, Settlement Officer White called petitioners and explained that she agreed with Appeals Officer Gottlieb's determination. Petitioners' CDP case was closed on September 19, 2012.

On September 26, 2012, respondent issued a "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" (notice of determination) sustaining respondent's collection action. Attached to the notice of determination was Settlement Officer Reubel's CDP memorandum, which provided in relevant part her recommendation:

> Taxpayers challenged the 'Assessed Balance' liability. The liability consists of Failure to File and Failure to Pay penalty. They did not file their 2008 return timely because Mr. Hoeffner was indicted on federal charges. Taxpayers claimed the court barred them from speaking with their accountant. However, taxpayers could not furnish proof of what steps they took to ask the Court to allow their accountant to prepare their return or try to hire another accountant.
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> Taxpayers should have at least paid the taxes due but did not pay the tax until the return was filed in 2010. There was no reasonable cause established for not paying their taxes and it was determined that they continued conducting their personal business affairs. Taxpayers did not exercise ordinary business care and prudence in providing for the payment of his tax liability.

The notice of determination further provided that "[i]f you want to dispute this determination in court, you must file a petition with the United States Tax Court within 30 days from the date of this letter." Petitioners timely filed their petition.

II. Discussion

This matter is before us at respondent's motion and petitioner's cross motion for summary judgment. Summary judgment may be granted with respect to all or any part of the legal issues in controversy where the record establishes "that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121(a) and (b); Craig v. Commissioner, 119 T.C. 252, 259-262 (2002). The moving party bears the burden of proving that there is no genuine dispute of material fact, and factual inferences are drawn in a manner most favorable to the nonmoving party. Craig v. Commissioner, 119 T.C. at 260. Respondent supports his motion with a declaration from Settlement Officer Iris Reubel and various exhibits. Petitioners support their motion with affidavits from Mr. Hoeffner, Mr. Flood, and Mr. White, as well as various exhibits.

For the following reasons, respondent's motion for summary judgment is granted and petitioner's motion for summary judgment is denied.

a. CDP Hearing

If a taxpayer is liable for any tax and neglects or refuses to pay that liability within 10 days after notice and demand for payment was made, the Commissioner is authorized under section 6331(a) to levy upon all property or property rights belonging to the taxpayer. Before the Commissioner may pursue collection by levy, however, he must notify the affected taxpayer in writing of his right to a CDP hearing with an impartial Appeals officer. See section 6330(a) and (b). Following the CDP hearing Appeals must issue a notice of determination which sets forth its findings and decisions. See sec. 6330(c)(3); see also sec. 301.6330-1(e)(3), Q & A - E8, Proced. & Admin. Regs. Section 6330(d)(1) allows for judicial review of Appeals' determination where the taxpayer files a timely petition with the Court.

Petitioners argue that notwithstanding numerous letters and phone calls between them and Appeals, no evidence exists that any substantive hearing had taken place and that petitioners were not given a substantive opportunity to "make their case". We disagree.

Section 6330(b) provides that if a taxpayer "requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals". Section 6330 does not specify at what location the Appeals hearing needs to take place or

whether it can occur via telephone. Furthermore, the legislative history of 6330 does not address this issue. See H.R. Conf. Rept. No. 105-599, at 263-267 (1998).

Although a section 6330 hearing may consist of a face-to-face conference, a proper hearing may also occur by telephone or by correspondence. Katz v. Commissioner, 115 T.C. 329, 337-338 (2000); sec. 301.6330-1(d)(2), Q & A-D6, Proced. & Admin. Regs. "[H]earings 'at the Appeals level have historically been conducted in an informal setting' and that nothing in section 6330 or the legislative history indicated that Congress intended to alter this format." Id. (citing Davis v. Commissioner, 115 T.C. 35, 41 (2000)).

In this case, petitioners received at least three telephonic conferences -- the first with Settlement Officer White on January 11, 2012, and the second and third with Settlement Officer Reubel on April 3, 2012 and April 19, 2012 -- and exchanged a number of written correspondences with Appeals. When the first two hearings were scheduled, petitioners were informed that it would constitute their CDP hearing and if they preferred, they could request a face-to-face hearing at the nearest Appeals office. Rather than requesting a face-to-face hearing, petitioners confirmed the scheduled telephonic hearing on both occasions.

In addition, a review of the administrative record in petitioners' CDP case reveals that petitioners advanced the same arguments and much of the same evidence in their CDP case that they now advance before this Court. Settlement Officer Reubel's CDP memorandum squarely addressed petitioners' argument that they had reasonable cause for the late filing of their 2008 return and for the late payment of their 2008 tax because a court order prevented them from contacting their accountant, Mr. White. Settlement Officer Reubel declined to find reasonable cause with respect to the late filing addition to tax because "[the] taxpayers could not furnish proof of what steps they took to ask the Court to allow their accountant to prepare their return or try to hire another accountant". Settlement Officer Reubel further declined to find reasonable cause with respect to the late payment addition to tax because "[the] [t]axpayers should have at least paid the taxes due but did not pay the tax until the return was filed in 2010".

We thus conclude that at least Settlement Officer Reubel heard and considered petitioners' arguments.[8] Petitioners' claim that they were not given a

[8]Because we conclude that Settlement Officer Reubel heard and considered the merits of petitioners' arguments, we need not decide whether Settlement Officer White also considered the merits of petitioners' arguments.

substantive opportunity to "make their case" is without merit. We further conclude that through the collective telephonic and written communications between Settlement Officer Reubel and petitioners, petitioners received a CDP hearing as required by section 6330(b). J & S Auto Painting, Inc. v. Commissioner, T.C. Memo. 2013-232, at *16-17 (holding that the communications between the Appeals officer and the taxpayer through letters, faxes, and telephone conversations constituted a proper CDP hearing) (citing Katz v. Commissioner, 115 T.C. at 337-338 (finding a combination of telephone calls and one or more written communications between a taxpayer and a settlement officer is sufficient to constitute a hearing)).

b. Underlying Tax Liability

Section 6330(c)(2)(B) permits taxpayers to challenge at a CDP hearing the existence or amount of the underlying tax liability to which a collection action relates only if the taxpayers did not receive a notice of deficiency for the liability or did not otherwise have an opportunity to dispute the liability. For purposes of a collection review proceeding, the phrase "underlying tax liability" includes the deficiency, additions to tax, penalties, and statutory interest. See Katz v. Commissioner, 115 T.C. at 338-339. The record does not establish, and respondent does not contend, that petitioner received a notice of deficiency for 2008 or that petitioner had a prior opportunity to dispute the additions to tax. Accordingly, we review de novo petitioners' entitlement to an abatement of the additions to tax as determined by respondent. See Downing v. Commissioner, 118 T.C. 22, 29 (2002).

1. Sec. 6651(a)(1) Late Filing Addition to Tax

Respondent bears the burden of producing evidence that the imposition of additions to tax is appropriate. See sec. 7491(c); see also Higbee v. Commissioner, 116 T.C. 438, 446 (2001). The parties agree that petitioners failed to timely file their 2008 return and on that basis we conclude that respondent has carried his burden. Petitioners thus bear the burden of proving that respondent's determination is inappropriate because the failure to timely file was due to reasonable cause and not due to willful neglect. Section 6651(a)(1); see also United States v. Boyle, 469 U.S. 241, 245 (1985).

To establish "reasonable cause", a taxpayer must "demonstrate that he exercised 'ordinary business care and prudence' but nevertheless was 'unable to file the return within the prescribed time'". United States v. Boyle, 469 U.S. at

246. "[T]he term 'willful neglect' may be read as meaning a conscious, intentional failure or reckless indifference." Id. at 245. Because we decide that petitioners' failure to timely file their 2008 return was not due to reasonable cause, we need not decide whether such failure was also due to wilful neglect.

Petitioners argue that the late filing of their 2008 return was due to reasonable cause because their attorney advised them to defer filing. In an affidavit, Mr. Flood states that "[Shortly after the IRS interviewed Mr. White in August 2007], I instructed Mr. Hoeffner not to contact Mr. White for any reason or in any manner" and that "I advised Mr. Hoeffner not to file a knowingly incorrect or incomplete return as it would exacerbate his criminal case". Mr. Hoeffner states in his affidavit that "[around August 2009] I informed my attorney, Chris Flood that I needed to send information and communicate with John White in order to get my return timely filed by October 15, 2009" and that "I was instructed by my attorney that under no circumstance was I to contact Mr. White in any manner, whether forwarding documents or having a third-party contact Mr. White on my behalf". Finally, Mr. White states in his affidavit that "[i]t would be virtually impossible for a new tax preparer to accurately report Mr. Hoeffner's 2008 income without making use of my 2007 work papers and supporting documents."

For the purposes of respondent's motion, we must draw all factual inferences in a manner most favorable to petitioners, the nonmoving party. Craig v. Commissioner, 119 T.C. at 260. Therefore, we accept as true that Mr. Flood advised Mr. Hoeffner not to contact Mr. White and that Mr. White's 2007 files were necessary to accurately complete petitioners' 2008 return.

"Factors constituting reasonable cause include 'unavoidable postal delays, death or serious illness of the taxpayer ... or reliance on the mistaken opinion of a competent tax advisor ... that it was not necessary to file a return.'" American Valmar Intern. Ltd., Inc. v. Commissioner, 229 F.3d 98, 104 (2d Cir. 2000), aff'g in part and remanding T.C. Memo. 1998-419. A taxpayer's reliance on the advice of a professional constitutes reasonable cause if the taxpayer proves by a preponderance of the evidence that: (1) the taxpayer reasonably believed the professional was a competent tax adviser with sufficient expertise to justify reliance; (2) the taxpayer provided necessary and accurate information to the advising professional; and (3) the taxpayer actually relied in good faith on the professional's advice. See Crimi v. Commissioner, T.C. Memo. 2013-51, at *98-99.

In this case, petitioners have failed to prove that they reasonably believed that Mr. Flood was a competent tax advisor. In fact, petitioners provide no credible evidence of Mr. Flood's qualifications to advise on tax matters. See Estate of Bates v. Commissioner, T.C. Memo. 2012-314, at *13-14 (finding no reasonable cause based on reliance on the advice of an attorney, who advised the estate's administrator that she lacked authority to file a federal estate tax return, where the attorney lacked tax expertise).

In addition, we have held that a taxpayer's reliance on professional advice not to file a tax return does not constitute reasonable cause because "[t]o hold otherwise would be to make the additions under section 6651(a) optional". Estate of Campbell v. Commissioner, T.C. Memo. 1991-615, 62 T.C.M. (CCH) 1514, 1524 (finding no reasonable cause based on reliance on professional advice not to file a return with incomplete information, where a taxpayer could file a timely return with a reasonable degree of accuracy based on his best knowledge).

Moreover, petitioners do not adequately explain why they did not move the District Court to amend its release order prior to October 15, 2009, the extended due date for their 2008 return. Instead, petitioners waited until a month after they received a taxpayer delinquency notice from the IRS on March 29, 2010, before moving the District Court for permission to contact Mr. White. Petitioners' motion to amend the release order, filed on April 29, 2010, was joined by the United States and granted by the District Court one day later, on April 30, 2010. Yet despite the fact that their 2008 return was already over six months late, petitioners did not file the return until August 4, 2010 -- over three months after receiving permission from the court to contact Mr. White. It is evident from the record that any delay in filing their 2008 return was petitioners' own doing. Petitioners have failed to show that their failure to timely file their 2008 return was due to reasonable cause.

2. Sec. 6651(a)(2) Late Payment Addition to Tax

Respondent contends that petitioners may not dispute the addition to tax under section 6651(a)(2) because they did not properly raise this issue at the CDP hearing.[9]

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[9]Respondent also alleges that petitioners did not raise the addition to tax under section 6651(a)(2) in their petition. Although the majority of their petition is devoted to contesting the section 6651(a)(1) late filing addition to tax, the petition does state that "[t]he instant assessment is based on the Petitioners' late filing of their 2008 income tax return, and late payment of federal income taxes due for

Upon petition to the Court under section 6330(d)(1) to review Appeal's determinations, taxpayers may dispute the underlying tax liability only if they raised the issue at the CDP hearing under section 6330(c)(2)(B). See Giamelli v. Commissioner, 129 T.C. 107, 112-114 (2007). "An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence." Sec. 301.6330-1(f)(2), Q & A - F3, Proced. & Admin. Regs. Requiring taxpayers to raise liability issues first with Appeals preserves the Appeals officer's role in the administrative review process and ensures any judicial consideration of such issues would not frustrate Congress' intent to streamline this review process. See Giamelli v. Commissioner, 129 T.C. at 114-115.

Construing the facts in the light most favorable to petitioners, we believe that petitioners properly raised the late payment addition to tax issue during their CDP case. In the notice of determination, Appeals stated that "[t]axpayers challenged the 'Assessed Balance' liability. The liability consists of Failure to File and Failure to Pay penalty". Appeals further addressed the merits of the late payment addition to tax in stating that "[t]axpayers should have at least paid the taxes due but did not pay the tax until the return was filed in 2010. There was no reasonable cause established for not paying their taxes".

Having found that petitioners raised the section 6651(a)(2) addition to tax issue during their CDP proceeding, we address whether petitioners are liable for the section 6651(a)(2) addition to tax. As explained earlier, respondent bears the burden of producing evidence that the imposition of additions to tax is appropriate. See sec. 7491(c); see also Higbee v. Commissioner, 116 T.C. at 446. The parties agree that petitioners failed to timely pay their 2008 tax and on that basis we conclude that respondent has carried his burden. Petitioners thus bear the burden of proving that respondent's determination is inappropriate because the failure to

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2008" and that "the Petitioners pray that this Court may try this case, determine that the Petitioners are not liable for any further taxes, interest or penalties of any nature for calendar year 2008". On that basis, we conclude that the petition placed respondent on notice that liability for the section 6651(a)(2) late payment addition to tax was at issue. See Wheeler v. Commissioner, 127 T.C. 200, 206-207, aff'd, 521 F.3d 1289 (10th Cir. 2008).

timely pay was due to reasonable cause and not due to willful neglect. Section 6651(a)(2); United States v. Boyle, 469 U.S. at 245.

Petitioners do not advance any argument for why the late payment of their 2008 tax was due to reasonable cause, aside from the arguments they have already made with respect to the section 6651(a)(1) late filing addition to tax. Therefore, for the same reasons petitioners have failed to establish that their late filing was due to reasonable cause, we also find that petitioners have failed to establish that their late payment was due to reasonable cause.

For the reasons stated above, it is

ORDERED that respondent's motion for summary judgment filed October 25, 2013 is granted. It is further

ORDERED that petitioners' cross motion for summary judgment filed November 14, 2013 is denied. It is further

ORDERED that the case is stricken from the Trial Session of Court set to commence on December 9, 2013, in New York, New York. It is further

ORDERED AND DECIDED that the determination of Appeals is sustained.

(Signed) David Laro
Judge

ENTERED: **NOV 26 2013**